1951

Florence Hirst Newcomb v. Ogden City Public School Teachers' Retirement Commission et al : Brief of Plaintiffs and Respondents

Utah Supreme Court

No. 7643

In the Supreme Court of the State of Utah

FLORENCE HIRST NEWCOMB, a retired teacher of the Ogden City Public Schools, for herself and all other retired Public School Teachers similary situated,

Plaintiff and Respondent,

vs.

OGDEN CITY PUBLIC SCHOOL TEACHERS' RETIREMENT COMMISSION, H. A. MACFARLANE, ALPHID HENDRICKSON, T. O. SMITH, GERARD KLOMP, LLOYD I. ALVORD and ASAEL MOULTON, as members of Ogden City Public School Teachers' Retirement Commission; BOARD OF EDUCATION OF OGDEN CITY, a public corporation, H. A. MACFARLANE, for himself and all other members of Ogden City Public School Teachers' Retirement Association who voted in favor of dissolving said Association,

Defendants and Appellants,

FLORENCE B. DRAKE, for herself and all other members of Ogden City Public School Teachers' Retirement Association who voted against dissolving said Association,

Defendant and Respondent.

PLAINTIFF AND RESPONDENTS' BRIEF

J. O. WOODY PRINTING CO., OGDEN, UTAH

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Additional authorities are cited in the briefs of previous cases of Newcomb vs. Ogden City Public School Teachers' Retirement Commission, et al, Case No. 7352, which briefs are referred to and adopted by respondents.

STATUTES CITED

In the Supreme Court of the State of Utah

FLORENCE HIRST NEWCOMB, a retired teacher of the Ogden City Public Schools, for herself and all other retired Public School Teachers similary situated,

Plaintiff and Respondent,

vs.

OGDEN CITY PUBLIC SCHOOL TEACHERS' RETIREMENT COMMISSION, H. A. MACFARLANE, ALPHID HENDRICKSON, T. O. SMITH, GERARD KLOMP, LLOYD I. ALVORD and ASAEL MOULTON, as members of Ogden City Public School Teachers' Retirement Commission; BOARD OF EDUCATION OF OGDEN CITY, a public corporation, H. A. MACFARLANE, for himself and all other members of Ogden City Public School Teachers' Retirement Association who voted in favor of dissolving said Association,

Defendants and Appellants,

FLORENCE B. DRAKE, for herself and all other members of Ogden City Public School Teachers' Retirement Association who voted against dissolving said Association,

Defendant and Respondent.

STATEMENT OF FACTS

The facts in this case with reference to the retirement of plaintiff and respondent, Florence Hirst Newcomb, and the fixing of her annuity upon said retirement as a member of the Ogden City Public School

Teachers' Retirement Association, are the same as stated in plaintiff's brief in case No. 7352, which has been before this court and entitled, Florence Hirst Newcomb, a retired teacher of the Ogden City Public Schools, for herself and all other retired public school teachers similarly situated, Plaintiff, vs. Ogden City Public School Teachers' Retirement Commission, et al, Defendants. Following the decision by this Court in that case and in accordance with the opinions of the Justices expressed therein, plaintiff filed this action in the District Court of Weber County, Utah, for a declaratory judgment, joining in the action in addition to the Ogden City Public School Teachers' Retirement Commission and its members, the Board of Education of Ogden City, H. A. MacFarlone for himself and all other members of Ogden City Public School Teachers' Retirement Association, who voted in favor of dissolving said Association, and Florence B. Drake, for herself and all other members of Ogden City Public School Teachers' Retirement Association, who voted against dissolving said Association.

The plaintiff and respondents adopt the statement of facts set forth in plaintiff's brief heretofore filed in this Court in the aforesaid mentioned action No. 7352.

The District Court of Weber County rendered a judgment in the action filed in this case, which held Chapter 91, Laws of Utah, 1949, purportedly authorizing the dissolution of local Teachers' Retirement Associations theretofore formed under applicable state law, unconstitutional for the following reasons:

First: That the Act impaired vested contractual rights of teachers who had retired from the Ogden School System.

Second: That the Act was invalid and void in that it permitted the Retirement Commission which administered the retirement funds created under the prior legislation to distribute the funds and assets of such Retirement Association "to the members of such Retirement Association and/or such annuitants and/or claimants," without any provisions limiting the discretion of such Retirement Commission, without providing standards to guide its discretion, or defining the respective rights of the respective parties, retired teachers, and members of the Retirement Association, or providing means to meet the contractual rights of the plaintiffs.

Third: That the Act was invalid and void in that it permitted dissolution of the Association and liquidation of its assets upon the affirmative vote of the members of the Retirement Association, and this without the consent of the Board of Education, or the retired teachers, other parties to the contract involved.

And that by reason of the unconstitutionality of the Act, the action of the members of the Retirement Association in voting to dissolve the same was a nullity.

From the decision of the District Court appellants appealed. Appellants, in the caption of their brief, erroneously designated Florence B. Drake as an appellant, whereas, she is a respondent and joins in this brief with the plaintiff and respondent, Florence Hirst

Newcomb, insofar as its argument runs to the invalidity of the 1949 Act, in its effect upon her and those similarly situated.

The points made by the appellants attack:

1. The complaint upon the ground of failure to state a cause of action.

2. The want of findings sufficient to support the conclusions of law.

3. Insufficiency of the findings and conclusions to support the judgment and decree; and

4. That the judgment and decree are contrary to law.

STATEMENT OF POINTS

The points upon which the plaintiff and respondents rely to sustain the judgment of the District Court are as follows:

1. The Ogden City Public School Teachers' Retirement Association is not insolvent.

2. The Association is not actuarially unsound, but even if it were, actuarial unsoundness is no ground or authority for the legislature to terminate such association without providing the annuitants with a substantial substitute for that of which they were deprived.

3. Chapter 91, Laws of Utah, 1949, is unconstitutional because it impairs plaintiff's vested right to receive an annuity for the remainder of her life.

4. Chapter 91, Laws of Utah, 1949, is unconstitutional because of its purported delegation of power to an administrative board without providing any standards to control discretion.

5. Chapter 91, Laws of Utah, 1949, is unconstitutional because it provides for dissolution of a local teachers' retirement association without the right of either the retired teachers or the Board of Education to vote thereon.

6. The purpose of Section 75-29-9 U.C.A. 1943, providing for increase or decrease of salary deductions was to provide a method of adjusting to meet any fluctuating demands on the finances of the Association, and was not intended to be used for the purpose of drying up the source of the funds of the Association.

7. Provisions such as those of Section 75-29-9 authorizing changes in salary deductions, cannot be applicable where their effect would be to diminish payments due to annuitants, no longer members of the Association, already retired when the change is made.

8. Section 75-29-15 U.C.A. 1943, providing for prorating to annuitants and claimants when current funds are insufficient was a carry-over from the early enactments which created a volunteer organization, later enactments having made membership compulsory. The legislature never intended this provision as an authorization to member teachers to wreck the Association and destroy the vested rights of retired teachers by drying up the source of the funds.

9. Section 75-29-15 provides for prorating to annuitants and claimants and refers only to annuities and

death refunds. Neither this nor any other statute confers a right to disburse the funds—and particularly the permanent fund—for the purpose of dissolving the Association as against the interests of those whose rights have vested by retirement.

ARGUMENT

Respondent Newcomb has heretofore filed in this Court briefs in Case No. 7352, entitled Florence Hirst Newcomb, a retired teacher of the Ogden City Public Schools, for herself and all other retired Public School Teachers similarly situated, vs. Ogden City Public School Teachers' Retirement Commission, et al, in which are set forth arguments and authorities pertaining to the unconstitutionality of Chapter 91, Laws of Utah, 1949. Respondents refer to and adopt respondent Newcomb's briefs in that case, and ask the Court to receive and consider them in this case. We do this with permission of the Court and in the interest of saving repetition and expense.

POINT I

THE OGDEN CITY PUBLIC SCHOOL TEACHERS' RETIREMENT ASSOCIATION IS NOT INSOLVENT.

The appellants seek a reversal of the decision in this case principally upon the grounds that the Ogden City Public School Teachers' Retirement Association is insolvent and actuarially unsound. We shall, therefore, treat this point first in answering appellants' arguments.

Respondents do not agree with the Statement of Facts appearing on pages 2 to 7 of appellants' brief. Some of the facts so given do not conform to the record, and other statements there made are misleading or incomplete. We direct attention to the statistical matter shown on pages 4 and 5 of the brief which falls in both categories—misleading, since it induces the eye to compare the figures given for contributions with the figures for expenditures, without taking into account the admitted fact, stated next under the Contribution figures, that the amounts paid by the teachers were met by equal contributions from the public funds; also misleading in that it shows expenditures and not receipts for the fiscal year 1939-40; and inaccurate as to the figures for 1949-50, and as to the actual state of the retirement funds, in the following particulars:

(1) It uses an annual figure for the fiscal year 1949-50 based on an expenditure of $16,402.40 for nine months. At the time counsel for appellants offered these statistics, this item was objected to by opposing counsel, and is not admitted as fact. Subsequently (Tr. 40-41) it was stated by counsel for appellants that the annuitants had received payment of all sums due as annuities for the months between July, 1949, and April 1950, both inclusive, a ten month period. That the $16,402.40 expenditure must cover a 10 months period is established further by the admitted fact (Ex. H.A. 2) that only 33 teachers then received annuities, one of whom received only nine payments prior to her death, so that the maximum annuity payments for ten months would be $16,450.00. The record does not show just

why the amounts stated by appellants as paid ran some $47.60 less than the maximum last noted, but undoubtedly some valid reason for that exists.

(2) The tabulation shown to establish that the Retirement Fund receipts available for the payment of annuities, was less than the sums paid out, does not take into account the earnings of the Permanent Fund, which unquestionably were available for such payments. The record does not affirmatively state just what those earnings were, but does afford data from which at least the minimum of such earnings can be computed. In the twelve month period ending June 30, 1950, interest receipts are shown to have been $1,225.00, plus some undisclosed amount of interest included in a mixed item of $1,334.00 accruing to the Fund from accrued interest and increment paid upon redemption of $15,000.00 in value of bonds which matured, and $9,000.00 in bonds which were sold during the period.

It seems highly probable that, of the $1,334.00 shown as increment and interest on bonds cashed and redeemed, the $1,323.50 which we do not take into account in the tabulated matter above, representing, as it does, an actual income gain, in large part, at least, should be added to the net gain of the five year period tabulated.

The average bond holdings of the Fund during that twelve month period was $66,000.00 (Deft. H.A. Ex.6), interest at 1 7/8% on which would amount to $1,237.50, and, at an average 2% return, would amount to $1,320.00. Assuming only $12.50 of the $1,334.00 to have been interest, the 1 7/8% return would seem to be a minimum with the 2% or more return probable. And it appears

from the statement of bond holdings of the fund that the investment was a stable one, remaining at $76,000.00 over the five year period from July 1, 1945 to the end of June, 1950, except for the changes noted in the last of the fiscal years, and the fact that from December 1, 1947 to February 4, 1948, the investments were down to $69,000.00. It is stipulated (Tr. 37) that costs of operation did not exceed $75.00 per annum.

Using the 1 7/8% average return figures only, a computation which shows the actual relation between receipts and expenditures of the Retirement fund over the five year period, (with the expenditures for the last fiscal year placed on a twelve month basis) would be as follows:

Fiscal Year	Teachers Payments	Matching Payments	Interest Less $75.00	Total of Receipts	Annuity Payments	Gain or Loss
1945-6	$6,883.11	$6,883.11	$1,307.50	$15,073.72	$16,323.33	—$1,249.61
1946-7	7,912.01	7,912.01	1,307.50	17,131.52	17,420.72	— 289.20
1947-8	8,642.45	8,642.45	1,219.83	18,504.73	16,225.68	+ 2,279.05
1948-9	9,078.38	9,078.38	1,307.50	19,464.26	19,290.36	+ 173.90
1949-50	9,694.07	9,694.07	1,307.50	20,695.64	19,682.88	+ 1,012.76
				$90,869.87	$88,942.97	+$1,926.90

Appellants figures would show total payments over the five fiscal years of $91,129.93, with receipts, including $42,210.02 from teachers, and an equal amount from public funds, of $84,420.04, a deficit of $6,709.89, thus appearing. The true figures should give an excess of receipts over expenditures materially in excess of the $1,926.90 we show, since it seems highly unlikely that the earnings were at less than a 2% average.

For the five fiscal years next prior to those covered by the above table, total receipts from contributions by teachers and the public funds as shown by appellants' table, were $57,538.08 against expenditures of

$43,284.24, the excess here shown not including any interest returns on investments of the permanent fund. Since only some $8,000.00 of permanent fund moneys came in by a legacy, (Tr. 26) and the rest consists of accumulated excess of receipts over expenditures, the $76,000.00 in investments on hand at the beginning of the 1945-46 fiscal year indicates an even higher excess ratio over the previous years in which the permanent fund was built up. Just such a financial showing should be expected from such a retirement plan, the excess of receipts over expenditures in the early years of its operation, when few have reached annuitant status, affording moneys for a permanent fund whose income, added to receipts, balances expenditures after the plan attains maturity.

Since appellants' brief discloses no argument bearing upon the matters included in their statement of points (A. Br. Pgs. 7-8) but is directed in large part to a discussion, based largely upon their summary of Facts (A. Br. 6-7), of a character which might appeal to a legislative body, but hardly constitutes matter for this court to consider, analysis of that Summary of Facts is indicated. In that Summary, appellants say:

Summary No. I The annuities of $50.00 per month now exceed the contributions of members and the school district.

Answer: True, but as we have shown by the statistical picture next above given in this brief, not in excess of such contributions and fund earnings.

Summary No. II Fifteen members are legally disqualified to ever receive any benefit from the local fund.

Summary No. III Those members are compelled to contribute to the local fund until it is dissolved.

Summary No. IV They are penalized to the extent of one-seventh of their normal benefits under the State Fund.

Answer: These statements by appellants cover matters which a legislative committee, considering amendments to the local retirement fund laws, might well consider. Were this an action by those fifteen teachers to have the law, so far as it required such contribution from them, declared to be unconstitutional, the statements would be of importance, but probably of no avail, since some inequities must be expected in the operation of any law which covers a broad field. But the inequity from which these fifteen teachers suffer has not the slightest bearing upon the question of the constitutionality of Chapter 91, Laws of Utah, 1949.

Summary No. V The number of annuitants and the amount necessary to pay them an annuity of $50.00 per month is increasing and will increase rapidly.

Summary No. VI The permanent fund will be depleted (if annuities are permitted to be paid therefrom) before the great majority of members reach retirement age.

Answer: The reasoning behind these statements obviously is based mainly on assumptions, and speculation, in the following particulars:

(a) The assumption that present annuitants will continue to live indefinitely.

(b) The assumption that many of those eligible for retirement will retire prior to age 70, when retirement becomes compulsory.

(c) The assumption that those who may retire, over the period covered by the figures given on page 5 of appellants' brief, will continue to teach in the system and live until the date when they may, or must, retire.

(d) The assumption that the Ogden School System will remain static without additions to staff such that funds available currently for annuity payments will increase as well as charges against the retirement fund.

(e) The assumption, contrary to appellants' own construction of the law (Br. 17-18) that the law requires the maximum payment of $50.00 per month to be met, an assumption opposed to their contention that where the retirement funds are not adequate to pay the full $50.00 per month annuity, the funds will be prorated and annuities reduced accordingly.

Appellants say (Br. 19) that "it is entirely speculative that contributions will increase in any substantial amount, since the School District is already levying all the taxes permitted by law."

Respondents direct attention to the statistics heretofore given by both sides to this controversy which have shown a gradually increasing contribution to the retirement fund, such that, in all but two years of the last ten as to which figures are given, the contributions did increase in substantial proportion to the annuity

requirements. It would seem that an argument, that normal increases in contributions would offset normal increases in annuity payments, is justified on the basis of Patrick Henry's statement "I know no way of judging the future, but by the past."

Little ground exists for belief that members of the Retirement Association, so long as they are physically able to work, will be willing to retire upon pensions. The continually increasing cost of living is a potent argument in favor of the monthly pay check as against the monthly pension check. And human nature is such that few, who have devoted the long number of years to an intellectual calling necessary to qualify for a pension under the Utah law, have a desire to retire short of the period when that becomes compulsory. It is not speculative to assume that, of the 134 who become eligible to retire in the ten year period referred to (Br. 5) few other than the 27 who are compelled to retire, will do so.

Nor is it speculative to assume that many, who might in time become eligible to retire, will not do so, since the age requirements, even in these days of life spans extended well past those our fathers knew, are at ages when the incidence of death is high and continually increases. It is rational and not speculative to assume that present annuitants will be greatly depleted in numbers during the ten years when the 27, or more, new annuitants are added to the pension rolls. It is rational and not speculative to assume that normal population growth will require additions to the Ogden teaching staff whose contributions will, as they have in the past, continually add to the amounts coming in to the retirement fund.

It is not legitimate argument to say, as we have quoted appellants, that this increase will not take place because "the School District is already levying all the taxes permitted by law". The record makes it clear that the public contributions impose no burden upon the funds of the Board of Education, except temporary financing, (Tr. 34) by advancing moneys to match teachers' contributions for only that time necessary to bill the State Teachers Retirement Fund for the amounts so advanced.

We submit that study of the facts adduced at the trial of the case indicate the likelihood of availability of means to meet all pension requirements which can be foreseen.

Summary No. VII. Summed up briefly, this argues that the great majority of members of the Retirement Association prefer the State Retirement System, and will oppose any movement to increase the base upon which teachers' contributions are levied. The assumption may or may not be correct—under a similar system in Salt Lake City the contributions were increased to 2% of the salary base. (Tr. 29). Just what effect a campaign, based upon the comparative merits of the local and state plan, might have upon the thinking of the teachers in the Ogden schools is speculative. But when Appellants speak, as they do under this point, of the "actuarial unsoundness" of the local plan, as contrasted to the State Retirement plan, they do not speak by the book.

An actuary is defined by Webster as one who "calcuates insurance risks and premiums". "Actuarily Sound" then, with reference to an insurance plan,

should mean one whose risks, and the reserves requisite to meet such risks, are calculable with some high degree of certainty. Applied to such a plan as the local teachers' retirement associations formed under Utah law the phrase upon the record here made, has no meaning. No showing is made that any statistical background exists sufficient to establish with any degree of certainty, when teachers, eligible to retire, will decide to do so. No statistics have been presented which afford any means of determining the possible life risks inherent in insuring annuities to the hundreds of teachers in the Ogden School System, nor are any statistics in the record from which it might be determined what proportion of these teachers would marry and retire, or turn to some other means of livelihood before attaining retirement age, and so lose their pension rights. There simply is no proof here justifying use of the phrase, except the relatively limited experience with this particular fund which indicates, as we have seen, the probability that moneys accruing to the fund should be substantially equal to the necessary expenditures from it.

We submit that the "Summary" presented by appellants does not represent reasonably established matter of fact material to the case, but rather matter in part of no materiality in the consideration of the constitutional question now involved, and in part bare assumptions of the appellants.

Since some considerable part of appellants' brief is devoted to discussion of the benefits appellants might have, were they to be able to have all of their contributions remain with the State Retirement Fund, it would seem proper to mention that that fund is far

from being "actuarily sound". It is set up on the basis of contributions from the teachers to be matched by sums contributed by the State, and since this Court takes judicial notice of acts of the State Legislature, as well as of reports of public officers and bodies, such as the administration of this fund, we think it proper to note that this fund has not been fed by the adequate legislative appropriations, and that its reserves are inadequate, right now, by very large sums, to discharge the obligations they are presumed to meet. An appropriation at the last legislative session of a million dollars to the fund only partly met this shortage.

If it be said that we have no right to assume that subsequent legislatures will not appropriate the moneys necessary to discharge the obligations of this fund, and so discharge the moral obligations of the State, we reply that appellants equally have no right to assume, as they do, that the Ogden Board of Education and the members of the Ogden Retirement System will not comply with the moral and legal obligations resting on them to provide means to pay the annuities contemplated by the retirement act. Perhaps if teachers now represented by appellants, become aware of the "actuarial unsoundness" of the State Teachers' Retirement Fund, they may desire to keep alive the local plan.

POINT II

THE ASSOCIATION IS NOT ACTUARIALLY UNSOUND, BUT EVEN IF IT WERE, ACTUARIAL UNSOUNDNESS IS NO GROUND OR AUTHORITY FOR THE LEGISLATURE TO TERMINATE SUCH

ASSOCIATION WITHOUT PROVIDING THE ANNUITANTS WITH A SUBSTANTIAL SUBSTITUTE FOR THAT OF WHICH THEY WERE DEPRIVED.

Justice Wolfe in his opinion in the former case of Newcomb vs. Ogden City Public Teachers' Retirement Commission, et al, ... Utah ....., 218 Pac. 2nd 287 at page 296 of the Pacific Reporter, stated what we believe to be the law with reference to this point as follows:

> "I have found no authority from jurisdictions adopting the rule which we did in the Driggs case, supra, i. e. that a retired school teacher has a vested right to an annuity in the amount to which he was entitled upon his retirement (whether the amount be certain as in the Driggs case or certain subject to a condition as in the instant case) holding that, because a public retirement system is actuarially unsound, the legislature may terminate the system without providing the retired pensioners with a substantial substitute for that of which they were deprived. It may be admitted for the purposes of this case that the legislature could alter, amend or modify the retirement system in order to strengthen its fibres and make it actuarially sound. But amending, modifying and altering is not the same as termination.
>
> "In Board of Education of Louisville v. City of Louisville, 288 Ky. 656, 157 S. W. 2d 33, the legislature of Kentucky had provided for the merging of local teachers' retirement associations with the state teachers' retirement association because the local associations were actuarially unsound. The statute authorizing the merger provided that if merger was effectuated,

> the state association must assume the obligations of the local associations. Had the statute not so provided, the court indicated, the rights of retired teachers in the local retirement associations would be impaired. The Supreme Court of California recently held in Kern. v. City of Long Beach, 29 Cal. 2d, 848, 179 P. 2nd 799, that a pension system may be terminated if those who have acquired vested rights therein are given a substantial substitute for that which they lose."

We think the Court can take judicial notice of the fact that the Legislature in its special session just concluded passed an Act repealing the Public Employees Retirement System Act, Chapter 131, Laws of Utah, 1947, and in so doing terminated that System, but was very careful to recognize the vested rights of retired members and to provide that all vested interests in retirement benefits be fully paid and protected.

POINT III

CHAPTER 91, LAWS OF UTAH, 1949, IS UNCONSTITUTIONAL BECAUSE IT IMPAIRS PLAINTIFF'S VESTED RIGHT TO RECEIVE AN ANNUITY FOR THE REMAINDER OF HER LIFE.

Plaintiff has a vested right to receive an annuity as fixed by the formula of the statute in effect at the date of her retirement, which formula fixes her annuity at $600.00. If the annuity is a "current expenditure" and if the "funds available" be construed to be only "current funds", then this right to receive $600.00 may be conditioned to the extent that it may be prorated in years where current funds are insufficient. This

fixed right of the plaintiff would be impaired by the dissolution of the Association under Chapter 91, Laws of Utah, 1949, and, therefore, that act is unconstitutional. We feel that the Driggs case and the ZCMI case cited and discussed in respondent Newcomb's briefs in the previous case are conclusive as to this point.

POINT IV

CHAPTER 91, LAWS OF UTAH, 1949, IS UNCONSTITUTIONAL BECAUSE OF ITS PURPORTED DELEGATION OF POWER TO AN ADMINISTRATIVE BOARD WITHOUT PROVIDING ANY STANDARDS TO CONTROL DISCRETION.

This point is also fully covered by the arguments and authorities in respondent Newcomb's brief and reply brief in the previous case.

POINT V

CHAPTER 91, LAWS OF UTAH, 1949, IS UNCONSTITUTIONAL BECAUSE IT PROVIDES FOR DISSOLUTION OF A LOCAL TEACHERS' RETIREMENT ASSOCIATION WITHOUT THE RIGHT OF EITHER THE RETIRED TEACHERS OR THE BOARD OF EDUCATION TO VOTE THEREON.

Chapter 91, Laws of Utah, 1949, provides for dissolution of a local teachers' Retirement Association without the right of either the retired teachers or the Board of Education to vote. Therefore, if such act were valid, the retired teachers could be deprived of their vested rights without any vote by them, and if it should be held that by reason of their contract with the Board of

Education, the Board would have to pay the retired teachers after the dissolution, then the Board of Education would be saddled with an obligation without any right to vote nor to channel the funds of the Association. Such a statute which would so work a deprivation of rights surely is unconstitutional.

POINT VI

THE PURPOSE OF SECTION 75-29-9, U.C.A. 1943, PROVIDING FOR INCREASE OR DECREASE OF SALARY DEDUCTIONS WAS TO PROVIDE A METHOD OF ADJUSTING TO MEET ANY FLUCTUATING DEMANDS ON THE FINANCES OF THE ASSOCIATION, AND WAS NOT INTENDED TO BE USED FOR THE PURPOSE OF DRYING UP THE SOURCE OF THE FUNDS OF THE ASSOCIATION.

Justice Latimer in the previous case of Newcomb vs. Ogden City Public School Teachers' Retirement Commission et al, at page 290 of the Pacific Reporter, states the purpose of Section 75-29-9 as follows:

> "In 1935 the legislature provided for a method by which the contribution of members and the matching funds of the board of education could be adjusted to meet any fluctuating demands on the finances of the association."

Manifestly this being the purpose of that Section it could not lawfully be used for the purpose of drying up the source of the funds of the Association and thus depriving retired teachers of their vested rights.

POINT VII

PROVISIONS SUCH AS THOSE OF SECTION 75-29-9 AUTHORIZING CHANGES IN SALARY DEDUC-

TIONS, CANNOT BE APPLICABLE WHERE THEIR EFFECT WOULD BE TO DIMINISH PAYMENTS DUE TO ANNUITANTS, NO LONGER MEMBERS OF THE ASSOCIATION, ALREADY RETIRED WHEN THE CHANGE IS MADE.

In the ZCMI case fully discussed in respondent Newcomb's brief in the previous case, it will be noted that the Board of Directors reserved the right to change the basis of pension allowances by increasing or reducing the same. This Court held that such a provision had no application to retired employees whose rights had vested, such employees having ceased to become members of the System upon their retirement. We think that this rule laid down in the ZCMI case applies with equal force to the case at bar, the authorization to decrease salary contributions applying only insofar as such change would not diminish the annuties payable to retired teachers who have ceased to be members.

POINT VIII

SECTION 75-29-15, U.C.A. 1943, PROVIDES FOR PRORATING TO ANNUITANTS AND CLAIMANTS WHEN CURRENT FUNDS ARE INSUFFICIENT WAS A CARRY-OVER FROM THE EARLY ENACTMENTS WHICH CREATED A VOLUNTEER ORGANIZATION LATER ENACTMENTS HAVING MADE MEMBERSHIP COMPULSORY, THE LEGISLATURE NEVER INTENDED THIS PROVISION AS AN AUTHORIZATION TO MEMBER TEACHERS TO WRECK THE ASSOCIATION AND DESTROY THE VESTED RIGHTS OF RETIRED TEACHERS BY DRYING UP THE SOURCE OF THE FUNDS.

Justice Latimer in his opinion in the previous case of Newcomb vs. Ogden City Public Teachers' Retirement Commission, et al, at page 292 of the Pacific Reporter says:

> "Section 75-29-15, U. C. A. 1943, seems to limit pensioners or annuitants to their prorata share of current funds but it is well to remember that this provision is a carry-over from the early enactments creating volunteer organizations and the legislature may have intended that the provisions apply with equal force if the association became bankrupt. However, it is difficult to chisel out from that section a legislative intent to permit teacher members to wreck the association and destroy the vested rights of retired members by drying up the source of the funds."

And Justice Wolfe in his opinion at Page 296 of the Pacific Reporter says:

> "An argument may be made that Mrs. Newcomb did not acquire upon her retirement a vested right to an annuity of $600 or her prorata share of the 'funds' available. Under Section 75-29-9, U. C. A. 1943, which was in effect at the time of her retirement, the retirement commission is given the authority to increase or decrease the rate of salary deductions subject to the approval of 2/3 of the members of the association and the board of education. Thus it can be argued that Mrs. Newcomb could not legally complain if the commission lowered the salary deduction rate so low that the financial demands upon the association greatly exceeded the proceeds coming into the association from teachers' salary deductions and matching funds paid by the board of

education and hence the association could pay Mrs. Newcomb only a nominal amount of her prorata share of the 'funds' available. The difficulty with this argument is that it is very doubtful whether the legislature intended that the power given to the commission to increase or decrease the salary deduction rate be used by the commission to dry up the replenishing sources of the funds. It is more reasonable to conclude that the legislature intended that that power be used by the commission to raise and lower the deduction rate as the demands upon the association varied from time to time with the view in mind at all times to keep the association solvent.''

We also call the Court's attention to the fact that this prorating provision was made when the system was voluntary and hence could not then affect vested rights because there could then be no vested rights. This provision was carried over but it certainly could not by reason of thus being carried-over affect vested rights, which became possible when the system became involuntary. Such provision could not affect vested rights in this case any more than such provision could be applied to affect vested rights in the ZCMI case.

POINT IX

SECTION 75-29-15, PROVIDES FOR PRORATING TO ANNUITANTS AND CLAIMANTS AND REFERS ONLY TO ANNUITIES AND DEATH REFUNDS. NEITHER THIS NOR ANY OTHER STATUTE CONFERS A RIGHT TO DISBURSE THE FUNDS — AND PARTICULARLY THE PERMANENT FUND

— FOR THE PURPOSE OF DISSOLVING THE ASSOCIATION AS AGAINST THE INTERESTS OF THOSE WHOSE RIGHTS HAVE VESTED BY RETIREMENT.

We think Chief Justice Pratt well stated the law when in his opinion in the previous case at Page 294 in Pacific Reporter said:

> "Section 75-29-15, U. C. A. 1943, which calls for prorating the funds to 'annuitants' and 'claimants' if they become deficient in amount, in my opinion carries no implication of legislative power to disburse the funds for the purpose of terminating the association. The section refers to 'annuities' and 'refunds *hereinbefore specified.*' The italized words refer to two specifications only: payments to retired personnel 'annuities,' (Sec. 75-29-11); and 'refunds' to claimants under Sec. 75-29-14 pertaining to the death of a member before retirement.
>
> "When Section 4757 of the Laws of 1917 — now Sec. 75-29-8, U. C. A. 1943 — made the retirement provisions of the association a part of the teachers' contract of employment, the above two contingencies were the only two that, by implication, if not expressly so stated in those contracts, became a possible liquidating limitation upon the rights that the teachers might acquire by complying with the provisions of the law pertaining to the association to the extent of a full performance of the contract relationships—that is by retirement. I find no implications in the law that reserve to any contracting party, or to the legislature, any right to dis-

burse the funds—and in particular the permanent funds — for the purpose of dissolving the association as against the interests of those whose rights have vested by retirement.''

Respondents, therefore, contend the judgment of the District Court should be sustained.

Respectfully submitted,

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